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No. 89-1782

In The

Supreme Court of the United States

October Term, 1989

DAVID HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS, STATE OF ALASKA,

Petitioners,

v.

NATIVE VILLAGE OF NOATAK AND CIRCLE VILLAGE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT CIRCLE VILLAGE

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QUESTIONS PRESENTED

1. Whether enactment of the Alaska Native Claims Settlement Act recognized the tribal status of Circle Village and other villages denominated in the statute.

2. Whether the Eleventh Amendment presents a bar to a suit by an Indian tribe bringing suit under 28 USC 1362.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTION & STATUTES

TABLE OF AUTHORITIES – Continued

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COUNTER STATEMENT OF CASE

Circle Village adopts the Counter Statement of the Case offered by Noatak as its own.

SUMMARY OF ARGUMENT

1. Alaska's argument that the Courts must review the tribal status of Circle under criteria set out in 25 C.F.R Part 83 lacks precedential support. Generally, the test articulated by Alaska as to tribal status is used with regard to tribes to which Congress and the Executive Branch have been silent. This is not the case for Circle.

1a. A long line of cases hold that Congress may recognize tribal status, and that such a determination will not be disturbed unless the action fails to relate to Congress' unique obligation toward Indians. In this case, Congress had dealt with Circle as a tribe in settling the Alaska Native Claims Settlement Act. Only tribes have aboriginal claims to land which may be settled outside the constitutional mandates of fair and adequate compensation. While ANCSA was a generous settlement in relation to other claim settlements, it was a settlement of aboriginal claims. Since Circle participated in that settlement it is axiomatic that Circle must be a tribe.

1b. Alaska argues that the Secretary has not recognized Circle. This is factually incorrect. Circle, as well as Noatak, appear on the 1st of recognized tribes published pursuant to 25 C.F.R. Part 83. Alaska attempts to confuse the matter regarding the inclusions of ANCSA corporation on the most recent list. Their inclusion, however, does not abrogate the prior recognition, and is not inconsistent with tribal status of the village councils. Moreover, subsequent enactments of Congress have carried forward to this policy by treating ANCSA villages as tribes for most major pieces of Indian legislation since ANCSA.

1c. Even apply Alaska's test, Circle easily meets the test of a historical Indian tribe.

2a. Alaska and other States argue that such suits by an Indian tribe are barred by the Eleventh Amendment. They argue that the Court implied a waiver of Eleventh Amendment rights in 28 U.S.C. 1362. This is not necessarily the case. The statute is more in the nature of a delegation of federal power to the tribes, and as such does not abrogate any right of the State, since the states have no immunity vis-a-vis the federal government.

2b. Moreover, the statute is a valid exercise of Congressional power over Indian affairs. The context gives rise to tension between Congress' power over Indian affairs and the States' rights under the Eleventh Amendment. Given the historically unequal status of tribes vis-a-vis the States, the tension between these two provisions of the Constitution are best resolved in upholding Congress' authority to protect Indian interests.

ARGUMENT

I. CIRCLE VILLAGE IS AN INDIAN TRIBE.

The Circuit Court of Appeals held that Circle Village was an Indian Tribe within the meaning of 28 U.S.C. Section 1362. The holding was principally based upon the inclusion of Circle within the Alaska Native Claims Settlement Act, [ANCSA] 43 U.S.C. Section 1610(b)(1), and subsequent enactments of Congress.

Alaska argues that the Court employed the wrong test to determine whether Circle is a tribe. They argue that:

> "When an Indian Group is not on the Secretary of the Interior's list of acknowledged tribes, as respondents are not, existing law requires a factual examination using either the criteria in the Federal Acknowledgment Process, 25 C.F.R. Part 83, or similar criteria in case law." Appellant's Brief at 28.

The argument is legally incorrect and somewhat factually misleading because 1) the State omits the legal principle that the Congress can recognize the existence of an Indian tribe and that this action is binding upon both the Executive and Judicial branches of the Federal Government, and that Congress has recognized Circle by enacting ANCSA and subsequent legislative enactments, 2) the Secretary has recognized the village of Circle as an Indian tribe, and 3) Circle's status as a tribe is easily demonstrable by readily ascertainable evidence contained in Government and other records.

A. Congressional Recognition Of Tribal Status Is Sufficient And Has Occurred With Regards To Circle.

The Court of Appeals correctly held that Congressional recognition is sufficient to establish tribal status and that such recognition is binding upon the Executive Branch. Congressional recognition of tribal status is accomplished in many ways, including the settlement of aboriginal land claims. Only tribes may have cognizable land claims based upon aboriginal title. Individual

Indians have no such rights.[1] ANCSA was a settlement of aboriginal land claims, and since Circle and Noatak were specifically included as Native groups whose claims were settled by the terms of the statute, the statute amounts to Congressional recognition. Moreover, subsequent Congressional enactments treating ANCSA villages as tribes, evince a continuing federal policy to extend this recognition to Circle, Noatak and similarly situated Alaska Native villages.

1) Congress has plenary power over Indian affairs which includes the power to extend recognition of tribal status and to reorganize tribal institutions.

As a general principle, Congress has broad power over Indian affairs. This power has been described as "plenary", however, it is not absolute. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974). Nonetheless, a long line of cases hold that this broad "plenary" power of Congress includes the authority to recognize the existence of Indian tribes. *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866); *Montoya v. United States*, 180 U.S. 261 (1901); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977). This power is derived from the Constitutional

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[1] *Cf. United States v. Dann*, 873 F.2d 1189, 1198 (9th Cir. 1989), *cert. denied*, 107 L. Ed. 2d 185 (1989) (upholding an individual right of occupancy). This right was, however, limited to *non-tribal* lands occupied by individual Indians prior to 1934, which is obviously not the situation of the Native Villages asserting pre-ANCSA claims. They asserted claims as *tribes* not individual Natives.

empowerment contained in the Indian Commerce Clause, which provides that Congress shall "regulate Commerce . . . with the Indian Tribes." U.S. Const. Art. I, Section 8, cl. 3. This is not to say that Congress has the exclusive power to determine tribal status. As the Petitioners claim, the Secretary of the Interior and the Courts have exercised this power, *infra*. However, the line of cases noted above, hold :hat the Constitution vests ultimate authority for determining tribal status in Congress.

In exercising this power, Congress has seldom applied ethnological standards of a purely scientific quality. Congress has consolidated/confederated different tribes into one tribal entity, and has subdivided other tribes into subgroups and recognized each sub-group as a separate tribe. *See* Cohen, Handbook Of Federal Indian Law, 6 (1982 Ed.). The Athabascans present a relevant case in point. Ethologically speaking, Athabascans are the same people as the Navaho, and are sometimes referred to as the Northern Navaho.[2] The Navaho, however, are organized into a single tribe, with tribal subdivisions called "chapters," which, as a practical matter, are the same as Athabascan villages. conversely, Athabascan villages are recognized as separate tribes, however, the tribes coordinate services through a single regional

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[2] Carl Waldman, *Encyclopedia of North American Tribes*, pp. 25-26 (1988). As a curious aside, there is an ancient Navaho prophesy that holds that the end of the world will occur when the Northern Navaho and the Southern Navaho are united in a single nation. The prophesy is not shared by the Athabascans, who sometimes express wonder at the unwillingness of older Navahos to meet.

non-profit agency. The difference is merely a reflection of different histories.

The practical effect of recognition of tribal status is somewhat analogous to the *de jure* recognition of a foreign government in international law, i.e. while a *de facto* government exists and has certain rights recognized by law, a *de jure* government is accorded the full rights of a foreign government under U.S. law. *Baker v. Carr*, 369 U.S. 186 (1962). So, it is similar with an unrecognized tribe.

Tribes not recognized by the federal government remain tribes in an ethnological sense. For example in *Joint Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the Court held that despite the fact that a tribe had not been recognized, it was still a tribe within the meaning of the Non-Intercourse Act of 1790. Similarly, tribes who have either never been recognized, or whose recognition has been terminated, may continue to have standing in Court. *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Tribes whose recognition have been terminated may continue to retain hunting and fishing rights, *id.*, and may in fact have recognition restored at a latter day by a pattern of Congressional action or express restoration. *See United States v. John*, 437 U.S. 634 (1978); 25 U.S.C.A. 903 *et seq.*

In contrast, recognized tribes enjoy a government to government relationship with the United States and the full panoply of immunities and privileges available to federally recognized tribes, 25 C.F.R. Sections Parts 83.6, 83.11. These include services provided under the Snyder Act (25 U.S.C. Section 13), Johnson-O'Malley Act (25

U.S.C. Section 452 *et seq.*), Indian Financing Act (25 U.S.C. Section 1451 *et seq.*), and the grants and contracts under the Indian Self-Determination Act (25 U.S.C. Section 450 *et seq.*), and the Indian Child Welfare Act (25 U.S.C. Section 1901 *et seq.*), as rights under a variety of other federal statutes. In the context of this case, recognition of tribal status includes the right to invoke federal court jurisdiction under 28 U.S.C. Section 1362.

2) Congressional recognition is a non-justiciable issue, binding upon the Judicial and Executive Branches.

This Court has long held that the recognition of tribal status is a non-justiciable political issue. In *United States v. Holliday*, 70 (3 Wall.) 407, 419 (1866) this Court stated:

> In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same.

This doctrine was further explained in *United States v. Sandoval*, 231 U.S. 28, 46 (1913) when the Court stated:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes . . . are to be determined by Congress, and not by the Courts.

In reviewing the general doctrine of the justiciability of political questions, the Court in *Baker v. Carr*, 369 U.S. 186, 684-5 (1962), reiterated these principles in extensive dicta, and subsequently held the same in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977) holding that

> the legislative judgement (of Congress) should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . .

In that case, the Court deferred to the Congressional recognition of two bands of Delaware Indians as two separate tribes and Congressional refusal to recognize a third band as a tribe.

Some of the early cases hold that judicial deference is to be given to actions of both the Congress and the Executive in recognizing tribes. It is difficult to determine which branch predominates in this respect. Subsequent termination cases, however, deny the power of the Secretary to terminate tribes independent of Congressional authority. The Courts have held that the Secretary's action to terminate a tribe must be authorized by Congressional statute, and that the failure of the Secretary to strictly carry out the procedures set forth by Congress invalidate the Secretary's actions to terminate a tribe. *See* Cohen, supra, at 813-814. Thus, while tribal recognition maybe extended by either the Congress or the Executive, a tribe may only be terminated by Congress. The implication is obvious: Congressional action in tribal recognition

matters predominates. This is consistent with the Constitutional grant of authority over Indian affairs to Congress, and the general function of the Executive Branch to carry out the legislative actions of the Congress.

3) The Court Of Appeals Correctly Held That Settlement Of Aboriginal Land Claims Constitutes Congressional Recognition.

Congress may act in a variety of ways to extend recognition to a tribe. In rare cases, Congress has simply passed a law which expressly extends recognition to a tribe, such as in the restoration of termination tribes.[3] More commonly, however, recognition flows from Congressional interaction with a tribe.

Of greatest relevance to the present case is *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977). The case involved a dispute between three bands of Delaware Indians over a judgment fund from the Indian Claims Commission in settlement of certain land claims. Two of the bands, the Absentee Delawares and the Cherokee Delawares, were included in the Congressional appropriation for settlement of the claim. Of these two bands, the first was specifically federally recognized prior to the judgment, while the second tribe was recognized by Congressional legislation providing for certain

[3] See Menominee Restoration Act (25 U.S.C. Section 903 *et seq.*) Siletz Restoration Act (25 U.S.C. Section 711 *et seq.*), Oklahoma Indians Restoration Act (25 U.S.C. Section 861 *et seq.*); Paiute Indian Tribe of Utah Restoration Act (25 U.S.C. Section 761 *et seq.*)

payments to the tribe. The third group, the Kansas Delawares, had not been the subject of prior Congressional action and were excluded from the land claims settlement legislation. This Court held that the tribes included within the settlement legislation were recognized tribes, while the excluded tribe was not. In reaching this conclusion, the Court noted that land claims were in fact tribal claims, and are a means of compensating a tribal entity for wrongful acts perpetrated against it, id at 184. The Court noted that the Indian Claims Commission was only empowered to hear claims brought by an "Indian tribe, band, or other identifiable group." id., citing 25 U.S.C. Sections 70a, 70i; *Minnesota Chippewa Tribe v. United States*, 161 Ct.Cl. 258, 270-271, 315 F.2d 906, 913-914 (1963).

The following year, this Court decided *United States v. John*, 437 U.S. 634 (1978), involving two bands of Choctaws: the "main" band which was removed from Mississippi and Georgia during the 1830's via the "Trail of Tears" to Oklahoma, and which had long been recognized, and the remnant band of Choctaws which had remained in Mississippi. This latter band had not been recognized until 1916, when Congress began to appropriate small sums of money "to investigate the condition of Indians living in Mississippi." From this beginning, federal involvement in the affairs of this band grew, and from this course of dealing, the Court found that the Mississippi Choctaw was a tribe.

4) ANCSA necessarily recognized the tribal status of Circle and Noatak and similarly situated Alaska Native villages by compensating them for the aboriginal claims which ANCSA extinguished.

As noted in the *Delaware* case, it is axiomatic that the only Native groups which may assert claims of aboriginal title are Indian tribes, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), this Court unhesitatingly affirmed that southeast Alaska Natives possessed tribal status and aboriginal title to the lands they occupied.[4] Id. at 273, 275, 279, 282, 285, 287. Subsequent cases confirmed this conclusion.[5] The rule that only

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[4] For earlier cases to the same effect, see *United States v. Ferrigan*, 2 Ak. Rpts. 442, 447-51 (D. Alaska 1905); *United States v. Cadzow*, 5 Ak. Rpts. 125, 125-29 (D. Alaska 1914). This later case held that the G'witchen Athabascan of Fort Yukon possessed the status of Indians.

[5] In *Tlingit and Haida Indians of Alaska v. United States*, 177 F.Supp. 452 (Ct. Cl. 1959), the court of claims held that the Tlingit and Haida Indians held aboriginal title which had not been extinguished by the Treaty of Cession. In *Edwardson v. Morton*, 369 F.Supp. 1359 (D.D.C. 1973) a federal district court held that prior to ANCSA, Alaska Natives held "rights based on aboriginal title," Id. at 1373, which the United States as trustee was required to protect against trespass. The federal government accepted the ruling and filed suit against the alleged trespassers. *United States v. ARCO*, 612 F.2d 1132, 1139 (9th Cir. 1980) *cert. denied*, 47 U.S. 888 (1980). The court, however, dismissed this case on the ground that ANCSA had extinguished all claims based on aboriginal title, which precluded any trespass claim.

tribes may hold aboriginal title, therefore, compels the conclusion that Alaska Native Villages hold tribal status.[6]

In ANCSA congress ratified a negotiated land settlement agreement between the United States and Alaska tribes.[7] Thus, ANCSA is a "treaty substitute."[8] Like most Indian treaties, its purpose, "was to obtain Indian lands", Cohen, *supra*, at 66, and Congress dealt with Alaska Natives in the same way it dealt with "Lower 48" Indians.[9] As a treaty substitute, ANCSA is subject to the same canons of construction as Indian treaties.[10] These canons require that Indian treaties be construed as the Indians would have understood them and that ambiguities be resolved in favor of the tribes. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174 (1973).

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[6] *See*, Smith and Kancewick, *The Tribal Status of Alaska Natives*, 61 Col. L.R. 455, 496-98.

[7] "Once ratified by Act of Congress, the provisions of the agreements become law, and like treaties, the Supreme law of the land." *Antoine v. Washington*, 420 U.S. 194, 204 (1975).

[8] C. Wilkinson, *American Indians, Time, and the Law*, at 64 (1987).

[9] H.R. Rep. 92-523, 92nd Cong., 1st Sess., at 4 (1971). The consistent policy of the United States in its dealings with Indian *tribes* has been to grant to them title to a portion of the lands which they occupied, to extinguish the aboriginal title to the remainder of the land by placing such land in the public domain, and to pay the fair value of the title extinguished. This treatment of Alaskan Natives on the same basis as other tribes subject to U.S. authority is in fulfillment of the Treaty of Cession whereby the U.S. acquired Alaska from Russia. See 15 Stat. 539.

[10] *Antoine*, 420 at 199-200.

That both Alaska Natives and Congress understood ANCSA to recognize and settle the *tribal* land claims of Native villages is evident from both the act and its legislative history. As noted by the Petitioners, Congress defined "Native Villages" in ANCSA in broad terms as

> any tribe, band, clan, group, village, community, or association in Alaska.

43 U.S.C. Section 1602(c). The language is remarkably similar to the language contained in the Indian Claims Commission Act which this Court held to refer to tribes in *Delaware Tribal Business Committee v. Weeks, supra.* ANCSA vested settlement benefits in village and regional corporations formed "by" the "member[s]" of the Village "for and on [their] behalf"[11]. 43 U.S.C. Section 1607.

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[11] *See,* 43 U.S.C. Section 1602(j) (defining "Village Corporation" as a corporation which acts *"for and on behalf of a Native Village"*) (emphasis added); and 43 U.S.C. Section 1611(a)(1) (authorizing "the Village Corporation *for each Native Village*" (emphasis added) to make selections under the Act); and 43 U.S.C. Section 1602 (defining "Native" as including "any citizen of the United States who is regarded as an Alaska Native by the Native Village or Native group of which he claims to be a *member*") (emphasis added); 43 U.S.C. Section 1610(b)(1) (listing the Native Villages entitled to the benefits of the settlement, including "Noatak" and "Circle"). In Alaska claims that ANCSA did not recognize the tribal status of Native villages because it did not choose them "as recipients of the land and money benefits under the Act", Pet. Br. at 34, is groundless. Unless form overrides substance, the ANCSA benefits *did* go to the villages, albeit through village and regional corporations established *by* and *for* the villages. In addition, the state argues that to construe ANCSA to recognize all listed villages is over inclusive because it would include some villages with inactive councils or a minority of Natives. Pet.Br. at 35. The state cites

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Further, because ANCSA was based on the Federal Field Committee Report[12] which thoroughly documented the

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no evidence to show that some councils are inactive and the state demographic records show that the vast majority of ANCSA villages are overwhelming, indeed almost exclusively Native. *See* Alaska Federation of Natives, *The AFN Report on the Status of Alaska Natives: A Call For Action* 36 (1989); *and also see,* Alaska Department of Labor, Research and Analysis. Demographic Unit, *Selected Characteristics for Alaska Cities and Boroughs* (1985). But in any event these factors are irrelevant to the existence of tribal status. There are numerous reservations in the lower 48 with predominantly non-Native population. *See* e.g., the Flathead Reservation in Montana where Indians make up only 19% of the populations. *Moe v. Confederated Salish Kootenai Tribes,* 425 U.S. 463, 466 (1976). This factor has never been held to affect tribal status. Similarly the fact that a council has been inactive does not bear on tribal status. Tribes retain their tribal status and powers despite long periods of non-exercise. *United States v. John, supra,* at 652. As the leading treaties notes:

> Neither the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self-governing entity. Once considered a political body by the United States [here, by virtue of the Treaty of Cession], a tribe retains its sovereignty until Congress acts to divest that sovereignty.

Cohen, *supra,* at 231; and *see Bottomly v. Passamaquoddy Tribe,* 599 F.2d at 1061, 1065 (1st Cir. 1979); and *Harjo v. Kleppe,* 420 F.Supp. 1110 (D.D.C. 1976) *aff'd sub nom., Harjo v. Andrus,* 581 F.2d 949 (D.C. Cir. 1978); C. Wilkinson, *American Indians, Times, and the Law* 32-46 (1987).

[12] Congress had been presented with overwhelming evidence, of the tribal status of Native Villages in Alaska. Federal Field Committee for Development Planning in Alaska. Federal

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tribal nature of the Villages' aboriginal claims, it constituted an implicit Congressional finding that the listed villages were capable of asserting such claims, that is they were *tribes*.[13] This is precisely what the court found below. *Noatak v. Hoffman*, 896 F.2d at 1160.[14]

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Field Committee for Development Planning in Alaska, *Alaska Natives and the Land* (G.P.O. 1968). This report was prepared at the request of Senator Henry M. Jackson, Chairman of the Senate Committee on Interior and Insular Affairs, and is recognized as a principal factual basis for much of ANCSA. The Report is a formal part of ANCSA's legislative history, S. Rep. No. 405, 92d Cong., 1st Sess. 73-74 (1971). *See* also Case, *supra* at 47, 129, 195, 205-207, 222-225, 236-245, 264-266; and the *Hearings before the Interior and Insular Affairs Committee on S. 35, S. 835 and S. 1571*, 92nd Cong., 1st Sess., at 514 (1971) (testimony of Governor Egan recognizing that "[s]ome kind of dominion by the Native people of Alaska has been exercised on occasion and from time to time over at least 60 million acres of Alaska").

[13] The 3 to 2 Alaska Supreme Court decision in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988) which concluded to the contrary, that "there are not now and never have been tribes of Indians in Alaska as that term is used in Federal Indian law," *id.* 35, 36, is legally, historically and anthropologically wrong. It was primarily based on old territorial decisions of District Judge Matthew Deady which denied tribal existence, aboriginal title, and the existence of Indian country. *See United States v. Seveloff*, 27 F. Cas. 1021 (D. Ore. 1872); *Waters v. Campbell*, 29 F.Cas. 411 (D. Ore. 1876); *Kie v. United States*, 27 F. 351 (D. Ore. 1886); *In re Sah Quah*, 31 F. 327 (D. Alaska 1886). These cases were wrong when decided and in any event have been implicitly overruled. *See United States v. Pelican*, 232 U.S. 442, 447 (1914) (the fact that Congress amended the non-intercourse Act to make allotments Indian country for the purposes of federal liquor laws does

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not mean Congress intended to exclude them from that category for other purposes); and *In re Minook*, 2 Ak. Rpts. 200, 221 (D. Alaska 1904) ("the Indian tribes of Alaska [have] the same status before the law as those of the United States"); and *United States v. Berrigan*, 2 Ak. Rpts. 442 (3d Div. 1905); *Nagle v. United States*, 191 Fed. 141 (D. Alaska 1911) and *U.S. v. Cadzow*, 5 Ak. Rpts. 125 (D. Alaska 1914) to the same effect; *See* also *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955), *Tlingit and Haida Indians v. United States*, 389 F.2d 778, 782 (1968) and *People of South Naknek v. Bristol Bay Borough*, 466 F.Supp. 870, 877 n.12 (D. Alaska, 1979) (upholding Native aboriginal rights); and *In re McCord*, 151 F.Supp. 132 (D. Alaska 1957) and *Chilkat v. Johnson*, ___ F.Supp. ___, (D. Alaska), (No. J84-024 Civ., decided Oct. 9, 1990) Slip Op. at 15 (affirming the existence of Indian country). Moreover, Judge Deady's conclusions that there were no aboriginal rights, no Indian country and no tribes in Alaska were premised on the incredible ground that to hold to the contrary would be against "the true interests of a white population" and therefore impermissible. *See* Neidermeyer, *The True Interest Of A White Population: The Alaska Indian Country Decisions Of Judge Matthew P. Deady*, 21 New York University Journal of International Law and Politics, 195 (1988).

As the Ninth Circuit succinctly put it in *Native Village of Venetie v. State of Alaska*, ___ F.2d ___ decided Nov. 6, 1990, Slip Op. 13583 at 13603. "Judge Deady's superannuated views of tribal sovereignty notwithstanding, such notions are not the law today." *See also* the Amicus Brief of the United States in *Puckett v. Tyonek*, No. 89-609, 8-12; and Smith and Kancewick, *The Tribal Status of Alaska Natives*, 61 U. of Col. L. Rev. (1990) demonstrating the tribal status of Alaska Native Villages historically and anthropologically as well as under principles of Federal Indian law.

[14] With respect to Native groups not previously recognized by the political branches, the basic criteria for determining tribal status was established by this Court's definition of "tribe" in *United State v. Montoya*, 180 U.S. 261, 266 (1901):

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While it is true that in ANCSA Congress extinguished "[a]ll aboriginal titles, *if any*"[15], this does not mean that Congress doubted the existence of any such title in Alaska. Congress was well aware that Alaska villages held aboriginal title. The Federal Field Committee report had thoroughly documented their tribal status as well as their aboriginal claims in every area of the state. And Congress "recognize[d] . . . that the Natives *do* have valid claims to some lands, undetermined in quantity and in value."[16] (emphasis added). The problem was

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> By a "tribe" we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory . . .

This definition was later relied on to define "any tribe of Indians" in the Indian Non-Intercourse Act. *United States v. Candelaria*, 271 U.S. 432, 443 (1926). Subsequently, it has become the accepted judicial definition of "tribe" for the purpose of determining tribal status. *Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377-78 (1975); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979); *Noatak v. Hoffman*, 896 F.2d 1157, 1160 (9th Cir. 1990); Smith and Kancewick, *supra*, 47. It also formed the basis for the recognition criteria used by the executive branch in the department of Interior's Federal Acknowledgement (FAP) regulations. 25 C.F.R. Section 83.7(b) and (c).

[15] 43 U.S.C. 1603(b) (emphasis added).

[16] H.R. Rep. No. 523, *supra* note 284, *reprinted in* 1971 *U.S. Code Cong. & Admin. News* at 2194-95 (emphasis added). *Accord* S.Rep. No. 405, *supra* note 319, at 76-77.

> The extent to which the Natives in Alaska could prove their claims of aboriginal title is not known. . . . If the tests developed in the courts with respect to Indian Tribes were applied in Alaska, the probability is that the acreage would be large – but how large no one knows . . .

Congress did not know precisely which lands could be claimed, how much could be claimed or its value. Because of these uncertainties, and the time required to resolve them, Congress decided "a legislative rather than a judicial settlement [was] the only practical course to follow." H.R. Rep. No. 523, *supra* note 284, *reprinted in* 1971 *U.S. Code Cong. & Admin. News* at 2194. *Accord* S. Rep. No. 405, *supra* not 319, at 77-78. The phrase "if any" therefore reflected Congress' desire to avoid passing on the validity of claims to particular parcels, rather than doubt as to the existence of any aboriginal title or as to the Villages' capability of possessing such title.[17]

This is not to suggest that quality of the land claims brought by Circle, Noatak, and other Alaska Native tribes is determinative of the tribal status of such claimants. Rather, as noted in the *Delaware Tribal Business Committee* case, the relevant fact is that Congress elected to treat the settlement of the claims as tribal aboriginal claims to land. In treating such claims as aboriginal claims, Congress a *fortiori* recognized the claimants as tribes.

An alternative characterization of the claims would lead to the conclusion that the ANCSA was violative of the Constitutional power of Congress. While the ANCSA was a generous settlement of aboriginal claims, it did not

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[17] Indeed, Congress confirmed the existence of such title when it amended ANCSA in 1987, by nothing that "[t]he Native rights to lands in Alaska *had been recognized* and preserved in the treaty with Russia acquiring Alaska; the Territorial Enabling Act; and the Alaska Statehood Act." (emphasis added) H.R. Rep. No. 31, 100th Cong., 1st Sess. 2 (1987); *See*, Smith and Kancewick, *supra*, at 513, M. 352.

seek to compensate Alaska Natives for the full and true value of their interests in lands. Rather, the 44 million acres of land and slightly less than one billion dollars received by Alaska Natives is an arbitrary figure unrelated to a valuation of land interest surrendered by Alaska Natives.[18] The significant difference between aboriginal title and any other form of interest in land, including other forms of tribal land ownership, is that aboriginal title may be extinguished by the United States without creating a constitutional right to adequate compensation. *Tee-Hit-Ton Indians v. United States, supra*. This unique ability of Congress to settle aboriginal claims outside the Constitutional protections against the uncompensated taking of property, flows from the unique status of Indian tribes and the nature of their title. *id*. See also *Johnson v. M'Intosh*, 21 U.S. (5 Wheat.) 543 (1823). As this Court in *Tee-Hit-Ton* noted, Alaskan Native claims were aboriginal in nature. In setting those claim, Congress so treated them. To now characterize the claims as some other type of claim, seriously calls into question the constitutionality of ANCSA as well as the adequacy of compensation provided under that Act.[19]

The state however, argues that ANCSA cannot be construe to recognize the tribal status of the listed villages because it defines "Native villages" as any "tribe,

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[18] 17 *See* fn. 15.

[19] If *Tee-Hit-Ton* was incorrect, an alternative basis to claim title by Alaska Natives probably may be found under the Treaty of Cession, which protected the interests in property of the inhabitants of Alaska at the time of transfer from Russian to the United States. *See* 15 Stat. 539.

band, clan, group, village community, or association," which would "include Native groups that could not claim tribal status." State's brief at 35. The argument assumes an erroneous statement of the law. As noted above, Congress had often used such broad language to refer to Indian tribes simply because the political organization of the various Native American tribes found in the United States is very diverse. For example, in *Montoya v. United States , supra*, the Court found that a rather large band of Indians comprised of a minority of three various tribes of Apache Indians (i.e. the Chiricahua, Mescalero, and Southern Apache) who had banded together to engage in war with the United States was a distinct tribe independent of the main bodies of such tribes of which the members were part. The Court noted that the words "nation," "tribe," and "band" have been used by Congress interchangeably. id., at 265. The lexicon of tribal denomination has grown considerably since 1900 to include the variations contained in ANCSA.[20]

5) Congress has recognized the tribal status of Alaska Native villages through other laws since ANCSA.

Every major piece of Indian legislation designed to further tribal self-government since ANCSA *expressly*

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[20] Numerous tribes in the lower 48, which are unquestionably federally recognized, are not called tribes at all. *See e.g.,*: the Onadoga *Nation* of New York; the Rincon *Band* of Mission Indians of California; the Table Bluff *Rancheria* of Wiyot Indians of California; the Reno-Sparks Indian *Colony;* the Ford McDowell Mohave Apache Indian *Community* of Arizona; and the *Pueblo* of Laguna. *See,* BIA list of federally recognized tribes for the lower 48, 53 Fed. Reg. 52829, Dec. 29, 1988.

defines Alaska Native Villages as tribes.[21] The significance of these actions is two fold, in that they evince a course of dealing with Circle, Noatak and other ANCSA recognized tribes consistent with federal recognition, and confirm that such a policy is consistent and furthers the Congressional intent in ANCSA itself.

As noted above, where Congress has engaged in a course of dealing with a Native group in a manner consistent with tribal status, Congress extends recognition of tribal status. *United States v. John, supra.* The legislative enactments demonstrate a consistent policy of Congress since ANCSA, to deal with the ANCSA villages as it does with other recognized tribes. Moreover, since most of these Acts specifically reference ANCSA, these Congressional actions would be *pari matri* with ANCSA: evincing an intention that ANCSA was in itself recognition of this ongoing government to government relationship.

The state argues that these acts recognize tribal status solely for the purpose of the particular Act. The Ninth Circuit acknowledged this possibility but rejected it on the ground that:

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[21] *See e.g.*, the following Acts all define the tribes to include the villages listed in ANCSA, 43 U.S.C. Section 1610. Indian Financing Act of 1974, 25 U.S.C. 1452(c); Indian Self-Determination and Education Act of 1975, 25 U.S.C. Section 450-450m, (*See* particularly 25 U.S.C. Section 450(b)); Indian Tribal Government Tax Status Act, 26 U.S.C. Section 7701(a)(40); Indian Health Care Improvement Act of 1976, 25 U.S.C. Section 1903(8); Clean Water Act, 33 U.S.C. Section 1377(g); Resource Conservation and Recovery Act, 42 U.S.C. Section 6903(13)(A); State and Local Fiscal Assistance Act, P.L. 92-512, Sec. 108(b)(14).

> the nature and scope of the federal government's relationship with the Native villages, as evidenced by these Acts, indicates that the recognition extends to legal claims.

Id.

The simple fact is that these enactments are too numerous and so parallel the unfolding Congressional policy toward all Indian tribes in this country as to deny a mere casual or incidental connection with Federal Indian Policy. Rather the sheer weight of the volume of the enactments reflect a conscious Congressional intent to incorporate Circle, Noatak and the other ANCSA tribes into the mainstream of Federal Indian Policy, save the character of Alaskan Native land tenure.

Pursuant to the Snyder Act 25 U.S.C. Section 13, Congress annually appropriates nearly $200 million for the benefit of Alaska Native people. In FY 1988 another $165 million was appropriated for Native Health programs in Alaska and significant additional funds were appropriated for Native Housing programs. Under the Indian Self-Determination Act Congress has appropriated millions of dollars in Federal grants to Native Villages in Alaska *for the express purpose of "strengthening or improvement of tribal governments."* (emphasis added) 25 U.S.C. Section 450h(a)(1). In 1984 there were 155 such grants in Alaska ranging between $6,000 and $15,000 each. Case, *supra* at 416. Under the Indian Financing Act, tribes, including Alaska Villages, are defined as "states" and thus as governments entitled to the benefits of the Act. 25 U.S.C. Section 1452(c), 31 U.S.C. Section 7102.

The state sees no intent to recognize Alaska Villages in the Self-Determination Act, 25 U.S.C. 250b(e) because it

also designated ANCSA corporations as "tribes" when in the political sense they unquestionably are not. The argument ignores the terms of the ANCSA which provide that the village corporations where organized *"for and on behalf of a Native Village,"* 43 U.S.C. Section 1611(a)(1). (emphasis added) In other words, the corporations were organized for and on behalf of the tribes. The fact that Congress granted a benefit to tribes does not diminish the status of the tribe under federal law so much as it reflects an ongoing intent to provide benefits to Alaskan Natives on account of their status as Indians.[22]

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[22] Congress explicitly defined tribes as: "Any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village * * * recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. Section 450b(b). The source of these programs is the government-to-government contracting which is authorized under the Act. The ending clause modifies the entire first clause but only that clause. The Ninth Circuit so construed this section in *Cook Inlet Native Ass'n. v. Bowen*, 810 F.2d 1471. The excluded reference to regional or village corporations established pursuant to ANCSA reflects that those entities were hastily added late in the legislative process and the modifying language at the end of the definition was not intended to apply to such corporate entities. *Id.* Congress included the corporations only so there would be a mechanism for contracting programs in communities where there was no "recognized" tribe (i.e., Anchorage and Fairbanks, where programs are contracted under the auspices of ANCSA regional corporations). This, of course, did not make the governmental purposes. *Cape Fox Corporation v. United States*, 456 F.Supp. 784, 798 (D. Alaska 1978).

B. The Secretary Of The Interior Has Recognized Circle And Noatak.

Alaska argues that the Secretary has not recognized Circle or Noatak in the administrative list of federally recognized tribes. Petitioner's Brief at 28. This is not the case. As noted by the Petitioners, the Secretary annually publishes a list of tribes recognized by the Secretary as tribes entitled to the "immunities available to other federally acknowledged tribes by virtue of their status as Indian tribes . . . " 25 C.F.R. Part 83.2. The villages of Circle and Noatak both appear on that list. *See* 53 Fed. Reg. 52832-52835.

Alaska argues that since the list includes many organizations, including ANCSA corporations, which are not governmental bodies, that the list is meaningless. The argument is disingenuous. The list is clearly published under 25 C.F.R. Part 83.2, which only relates to tribal recognition. Moreover, prior lists published by the Department of the Interior did not contain the ANCSA corporations. Cf. 51 Fed. Reg. 25115 (July 10, 1986). As the 1989 preamble explains, the ANCSA corporations were added because they are eligible to contract on behalf of villages under the Indian Self-Determination Act and are eligible for some services on account of their status as "Indian". The ANCSA corporations are clearly distinguishable from the village governmental entities. Moreover, as noted above, the ANCSA corporations were organized "for and on behalf" of the tribes, and merely because Congress creates corporations for the benefit of a

tribe does not diminish the tribe's status.[23] *Supra*. Finally, as noted below, the Secretary's power to terminate tribal power once a tribe is recognized must be authorized specifically by Congress. See COHEN, *supra*, at 813-814. The Commissioner's argument suggests that the Secretary may do by implication that which he cannot do directly, which is to say that the confusion raised by Alaska regarding the 1989 list somehow abrogates the effect of the 1986 list. Abrogation of tribal status and or rights is reserved to Congress, and such abrogation must be explicit. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

The fact that the list includes ANCSA corporations does not deny the basic function of the list, and recent pronouncements of the BIA on tribal status of entities not the subject of this litigation, does not deny the effect of prior actions of the Secretary which unambiguously recognize the tribes.

Other administrative agencies of the federal government have similarly recognized the tribal status of the villages. The Administration for Native Americans (ANA) within the Department of Health and Human

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[23] It should be noted that Sec. 17 of the Indian Reorganization Act also authorized the creation of corporations for the benefit of tribes. *See* 25 U.S.C. Section 477. The major distinctions are that under the IRA, the corporations were incorporated under federal law as opposed to the ANCSA which organized the corporations under state law, and that there was greater latitude in the internal structure of the IRA corporations than exists under ANCSA. Recently, Congress has authorized greater flexibility for ANCSA corporate structure than was previously permitted. P.L. 100-241.

Services has recognized the tribal status of Native Villages listed in ANCSA by awarding them numerous grants for tribal self-determination, including the formation of "tribal courts." 51 Fed. Reg. 36517 (Act. 10, 1986). In its program announcement, ANA notes that "[i]n the development toward self-sufficiency, ANA places the highest emphasis on increasing the effectiveness of the *governing capabilities of* Indian tribes, *Alaska Native Villages*, and Native American groups." 51 Fed. Reg. 36518 (Oct. 10, 1986) (emphasis added). *See also, ANA Availability of Financial Assistance*, 53 Fed. Reg. 28442, 28443-28444 (July 28, 1988).

The Internal Revenue Services has determined that "Alaska Native Villages", including Noatak and Circle, are eligible for revenue sharing benefits because they *"carry out substantial governmental duties and powers."* (emphasis added) 31 U.S.C. Section 6701(a)(5)(B) (repealed April 7, 1986, P.L. 99-272, Title XIV, Section 14001(a)(1), 100 Stat. 327). The Secretary of the Treasury, after consultation with the Secretary of the Interior has also determined that Alaska Native Villages, including Noatak and Circle, have "governing bodies" which "exercise governmental functions" within the meaning of the Indian Tribal Governmental Tax Status Act. *See* 26 U.S.C. Section 7701(a)(40)(A); 26 C.F.R. Section 305.7701-1; Rev. Proc. 83-87 (listing "Alaska Native Entities" recognized to exercise governmental functions.)[24]

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[24] Although the Tax Status Act disclaims any intent to validate or invalidate claims of sovereign authority over lands or people, it does *not* disclaim recognition of the tribal *status* of the listed villages.

In short, the Executive Branch, acting through the Departments of the *Interior, Treasury, Health and Human Services, Housing and Urban Affairs* and through the *IRS* and *EEOC* have all expressly recognized that Alaska Native Villages including Noatak and Circle, are "tribes."

C. Circle Would Be Recognized As A Tribe Using The Test Articulated By The Petitioner Applicable To Unrecognized Tribes.

The Commissioner argues that Circle must demonstrate in Court that it is a tribe using the criteria enunciated in the Federal Acknowledgment Process, (FAP) 25 C.F.R. Part 83, and cites as authority for such proposition, *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979), and *Native Village of Venetie v. State of Alaska*, ___ F.2d ___, No. 88-3929 (9th Cir. Nov. 6, 1990). Petitioner's Brief at 28. The authority is misplaced.

The first two cases dealt with groups which have never been recognized by Congress or Executive action. In the face of Congressional and Executive silence providing for the treatment of the claimants as Indian tribes, the Courts looked to the criteria contained in the FAP regulations. The obvious distinction is that both the Congress and the Executive have a long history of dealing with Alaska Native Tribes. In the Venetie case, the Court expresses uncertainty respecting the tribal government structure and enunciated a test that the claimant regime demonstrate an historical nexus between it and the historical tribe from which it claimed descent. In this case,

there is no ambiguity surrounding the tribal governing regime.

Nonetheless, Circle can easily demonstrate that it is a tribe under the test articulated in the FAP regulations from materials readily available to this Court. The Commissioner puts forward an inaccurate generalized "history" of tribal organization in Alaska to suggest that Alaska "tribes" were composed of miscellaneous, unassociated Indians bound together by an accident of geography. While this is unlikely with regards to any Alaskan Villages, it is patently erroneous with regard to Circle.

The Interior of Alaska has been populated by Athabascan[25] Indians since prior to the coming of the Russians in 1843.[26] The Indians of the Interior were the last to come into contact with white men.[27]

Athabascan is a linguistic family which includes Indians from Alaska, across Canada and extending down to the Mexico border.[28] Prior to the coming of the

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[25] Also Athapascan, Athapaskan, Athabaskan.

[26] Clarence C. Hulley, *Alaska: Past and Present*, 1958 at p. 27.

[27] Ibid.

[28] See John R. Swanton, *Indian Tribes of Alaska and Canada*, A Reprint of a Portion of *"The Indian Tribes of North America"* first published in Washington, D.C., 1952, Facsimile Reproduction 1971. See also *Alaska: Past and Present*, Ibid. pp. 27-28; Don Charles Foote and Sheila K. MacBain, *A Selected Regional Bibliography for Human Geographical Studies of the Native Populations in Central Alaska*, Geography Department Publication no. 12, 1964; *Compilation of Narratives of Explorations in Alaska*, Washington Government Printing Office, 1900, Report of Ivan Petrof on the Population Resources, Etc. of Alaska, From the United States Census Report of 1880, pp. 257-258.

Russians, British, and Americans, the Gwich'in[29], the Athabascan Indians of the Upper Yukon River in Alaskan Interior were semi-nomadic, residing along the drainage of the Yukon River. They moved from place to place within their territory in a constant food quest.[30] They lived a subsistence lifestyle, which required a particular permanent hunting grounds usually extending for several hundred square miles. The Interior of Alaska did not support a large population. A tribe needed its entire hunting ground to support itself, the territory was jealously guarded. For the most part these people lived in the Interior of Alaska along large rivers and their tributaries.[31]

The governmental organization of these semi-nomadic Indian tribes was not a complicated one. Each tribe was headed by some man, who by common consent, was recognized as chief, but had only such authority as the individuals were willing to grant him. Community affairs were settled by a general council in which the

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[29] Also Kutchin, Kwitchin, Kuchin, Gwitch'in, Gwitchin, Dene, Tinneh and other name spellings depending on author and source.

[30] *Alaska: Past and Present*, Ibid. at p. 27; *Indian Tribes of Alaska*, Ibid. at pp. 529, 533-540, 543-544; *Compilation of Narratives of Explorations in Alaska*, Ibid. pp. 257-263, Report of a Military Reconnaissance Made in Alaska in 1883, Lieut. Frederick Schwatka, pp. 338-352. Report of a Military Reconnaissance in Alaska, made in 1885 by Lieut. Henry T. Allen, Second United States Cavalry, pp. 476-482.

[31] *Alaska: Past and Present*, Ibid.; *Indian Tribes of Alaska*, Ibid.; *Compilation of Narratives of Explorations in Alaska*, Ibid.

chief and the older men decided matters by rule of custom.[32] Tribes were often distant from one another geographically. Upon occasion, a paramount chief was recognized by a number of tribes as a leader with several sub-chiefs, but this was rare.[33]

The Gwich'in were first brought into contact with Europeans when Alexander Mackenzie met some of them in 1789 during his descent of the river which bears his name. This acquaintance became more familiar with the establishment of the first Fort Good Hope in 1847. Until Alaska passed into the hands of the United States, practically all of the relations which the Gwich'in Tribes had with Europeans was through the Hudson Bay Company.[34] Since then influences from the west have been more potent. Missionaries followed close upon the heels of the traders[35]. Then came the discovery of gold in the Klondike region and the rush of miners which followed.[36]

When the non-Native entered the interior of Alaska, he came to trade and later to exploit the natural resources

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[32] *Alaska: Past and Present*, Ibid. at p. 28; Robert J. Peratrovich, Jr., *State of Alaska Department of Education Source Book on Alaska*, Revised Edition, 1971, pp. 26-27.

[33] *Compilation of Narratives of Explorations in Alaska*, Schwatka, Ibid. p. 315.

[34] Although admittedly they may have had some minor contact with the Russian American Company and with the Russian Imperial Navy. See Compilation of Narratives of Explorations in Alaska, Ibid. p. 417.

[35] William E. Simeone, *A Catalog of Photographs from the Archives and Historical Collections of the Episcopal Church*. For the Alaska Historical Commission, 1981, Appendix.

[36] *Indian Tribes of Alaska*, Ibid. at 536-537.

of the indigenous peoples' territories. At first, the traders located their trading posts in or near Natives' semi-permanent settlements or ceremonial meeting places. Later, the trading posts were placed at a distance from the Native Villages as the clash of cultural expectations between the Indians and the traders made the traders uncomfortable in close proximity to the Indians.[37] Shortly after the arrival of the explorer and trader, came the church.[38] The miner followed close on their heels to pursue his dreams of gold.[39] For the most part, the explorer

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[37] Evidence of the discomfort of the traders is described obliquely in *Compilation of Narratives of Explorations in Alaska*, Schwatka, Ibid. p. 341. "About a mile below [the village] are several well-built log houses formerly occupied by traders, but have since been abandoned as unprofitable, it being considered wiser, if possible, to make the Indians come to a store rather than locate it in their midst, on account of the inherent tendency among them to covet everything they see."

"This, as well as the other tribes of this section, have peculiar ideas of right and honor, for while apparently never hesitating for an instant about making away with anything which happens to please them, provided it be not stored away, yet if 'cached,' as it is called, away from the owner, they will not touch it, and are said to regard this with such respect as to almost starve before helping themselves to any food so cached." Ibid. at 343.

It is a fact, although not as well described, that the Natives were equally disturbed by the non-Native's culture and culturally based expectations. In fact, it is the clash of cultures, that was likely responsible for the killings of traders at the Russian trading station in Nulato in 1851. *Compilation of Narratives of Explorations in Alaska*, Raymond, Ibid. pp. 36-37.

[38] *A Catalog of Photographs*, Ibid.

[39] *Alaska: Past and Present*, Ibid. at pp. 222-229.

and miner were transients, (although some stayed on and their descendants remain to this day,) leaving for new discoveries, new "strikes" and new territories. There remained the trader, the church and the tribes.

The history of the Native Village of Circle Tribe and the geographic community of Circle are a strong example of this history pattern. Charley's Village[40] was a Tudush[41] Tribe and was and is Gwich'in. There is dispute among the various authorities as to whether Charley's Village was Han Gwich'in, Kutcha-Gwich'in, or Tennuth-Gwich'in[42]. For the purposes of this argument, which Gwich'in they are is not important. What is important is that the tribe had a semi-permanent settlement along the Yukon upriver of Fort Yukon in 1883.[43] The tribe was ruled by a Chief known as Charley.[44] Although the former geographic location of this semi-permanent settlement is uncertain, it is believed that Charley's Village was approximately 48 miles from the present geographic location of Circle.[45] The tribe was known as a genial people friendly to the white traders and explorers.[46]

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[40] In some sources "Charlie's Village".

[41] Or Tadoosh.

[42] Or Han Kutchin, Kutcha-Kutchin, or Tennuth-Kutchin.

[43] *Compilation of Narratives of Explorations in Alaska*, Schwatka, Ibid. pp. 312-313, 316, 343.

[44] Ibid. at 343.

[45] Ibid. at 316 and maps; Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land*, 1968 Map of Native Communities of Alaska.

[46] *Compilation of Narratives of Explorations in Alaska*, Schwatka, Ibid. pp. 312-313, 343.

In 1887, L.N. McQuesten located a trading post at the present geographic location of Circle. After the strike in 1893, when gold was discovered in Birch Creek, the former trading post became a booming mining supply town.[47]

In 1896, the population was estimated by the Episcopal Church to be great enough to establish a church there. When Bishop P. T. Rowe visited there in that year, he found Alaska Indians who were already converted to Anglicism.[48] But by 1910, with the ending of the gold rush, the population of Circle had shrunk to 144.[49] It was increased in 1914 when the remaining members of the Charley Village Tribe[50] moved to the Circle geographic location because the settlement at the original Charley's Village location was destroyed by the ice breakup on the Yukon that year.[51] As acknowledged by Petitioners, the majority of the population of Circle is Native. Most of the non-Native majority population of Circle left and did not

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[47] *Alaska: Past and Present*, Ibid. at p. 228, *Alaska Natives and the Land*, Ibid. at p. 209 and Donald J. Orth, *Dictionary of Alaska Place Names*, Geological Survey Professional Paper 567, U.S. Government Printing Office, 1967 p. 219.

[48] *A Catalog of Photographs*, Ibid. Records of the Episcopal Church indicate that the Indians in Circle at this time came from Tanana, Porcupine and Charley Tribes.

[49] *Dictionary of Alaska Place Names*, Ibid.

[50] The population of the Charley's Village Tribe in 1883 was 40 to 50 people. *Compilation of Narratives of Explorations in Alaska*, Schwatka, Ibid. p. 343.

[51] *Alaska Natives and the Land*, Ibid. at p. 206. This move alone demonstrates the tribal nature of the Charlie's Village people in that they moved to Circle as an intact unit.

return. The Native population remained and is there to this day as the majority.

The Native Village of Circle Tribe, which is the historic Charley's Village Tribe, can trace it's member families back to those Indians in Circle in 1914. The Native Village of Circle still has a traditional form of government, a Chief and traditional council.[52] The Chief continues to have only as much authority as the members of the tribe grant him. The Chief and the Council continue to rule by rule of custom. The tribe is distinct from other Athabascan Tribes and yet has much in common with them. Its government has maintained its integrity since its establishment, although, like all governments it has been sometimes stronger than other times.

Oddly enough, Alaska has dealt with the Circle Village Council in a government-to-government relationship. For example, the Alaska Department of Community and Regional Affairs has concluded an agreement with the village council to co-manage the lands set aside for community expansion under Sec. 14(c) of ANCSA. That agreement expressly acknowledges the government-to-government character of the arrangement.[53] Additionally, the Alaska Department of Health and Social Services has recently concluded another "government-to-government" agreement with the village council under Sec. 109 of the Indian Child Welfare Act.[54] These agreements expressly

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[52] *Alaska Natives and the Land*, Ibid. at p. 47; Case. *Alaska Natives and American Laws*, pp. 341-343 (1984).

[53] See Supplemental filing by Circle.

[54] *Id.*

recognize that the village council is a governing body of some importance in the community, sufficient for Alaska to consider it a "government". The agreements also reflect the fact that the state considers the Council significant enough to its governance of the village to pursue cooperative arrangements. It is indeed curious that while Alaska claims that they are not a tribe, the state engages in relations with the village which are peculiar to tribal status.

Under even the test the State of Alaska proposes, the Native Village of Circle is a tribe, entitled to tribal status and the benefits of tribal status.

II. THE ELEVENTH AMENDMENT IS NOT A BAR TO THE TRIBES' SUIT.

The Petitioner Alaska and Amici contend that the Court of Appeals erred in holding that the Eleventh Amendment is not a bar to suit by tribes suing under 28 U.S.C. 1362. This statute provides that the federal district courts shall have jurisdiction to hear suits brought by Indian tribes.

Alaska and Amici generally contend that the states possess sovereign immunity from such suits. They acknowledge that such immunity from suit does not apply in two cases: a suit by the Federal Government or a Sister State against a state,[55] or where Congress has

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[55] Generally citing, *United States v. Texas*, 143 U.S. 621, 645 (1892); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

abrogated a state's immunity by statute where such abrogation is explicit and textual.[56] The Circuit Court noted that 28 U.S.C. 1362 does not contain an explicit and textual abrogation of state sovereign immunity. Consequently, the states argue that the Circuit Court's analysis is flawed.

Alaska's argument rests upon the unstated assumption that the Circuit Court's analysis is intended to fall within the latter of these two exceptions to state sovereign immunity. This is incorrect. Rather the reason a tribe may sue a state under U.S.C. 1362 without consideration of the state's Eleventh Amendment protections is found in the first exception noted above.

Phrased another way, the reason an explicit and textual abrogation is not required in the statute is that no abrogation of states' rights has been made. Rather 28 U.S.C. 1362 is a delegation of federal rights, not an abrogation of states' rights.

A. Congress Has Delegated To The Tribes Its Authority To Sue The States.

It has long been admitted that Congress may delegate to the tribes certain authority which it may possess over Indian affairs. *United States v. Mazurie*, 419 U.S. 544 (1975) (Congress may delegate to tribes the authority to regulate alcohol within Indian Country). *See also*, Indian Self-Determination and Education Act 25 U.S.C. Section

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[56] Generally citing, *Dellmuth v. Muth*, ___ U.S. ___, 105 L. Ed. 2d 181 (1989); *Atascedero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

450 et seq. (authorizes the delegation by contract to tribes the authority to operate Indian programs).

The statute in question, 28 U.S.C. 1362, delegates to tribes the authority to bring causes of action before the district courts without regard to the other jurisdictional requirements of federal law.

The legislative history[57] of the statute clearly indicates that it was intended to delegate to the tribes the authority to bring suit in federal court to the same extent that the federal government could bring suit on behalf of the tribes. Two justifications were offered for the statute. First, Congress wished to remove jurisdictional bars to the federal forum for tribes: most notably the requirement of a $10,000 jurisdiction amount. H.R. Rep. No. 2040, 89th Cong., 2d Sess., (1966) reprinted at 1966 U.S. Code Cong. Section Admin. News 3146. Second, the statute would allow tribes to bring suit to protect their interests where the U.S. Attorney declined to bring an action. *Id.*, at 3147. These purposes, taken together, are a delegation to the tribes of the federal authority to represent the Indian tribes in litigation, in federal court

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[57] It is anticipated that the states will object to a review of the legislative history in light of this Court's statements in *Dellmuth* which rejects the use of legislative history to determine whether an abrogation of a state's Eleventh Amendment's rights has been made. The reference to legislative history employed here is not to show that an abrogation of state's rights occurred. Rather, the legislative history is offered for an altogether different purpose, i.e., to demonstrate that an abrogation did not take place and that a delegation of federal power was contemplated by Congress.

notwithstanding jurisdictional bars to such representation not occasioned by federal representation.

It must be noted that the doctrine of sovereign immunity is a jurisdictional bar in the federal courts. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). It is not a bar, however, to the federal government. Congress expressly wished to delegate to the tribes its unique access to federal courts notwithstanding jurisdictional bars which otherwise limit tribes' ability to protect their interests in the federal courts.

This Court has held that a tribe suing under this statute stands in the shoes of the federal government; clothed in the privileges of the federal government. *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976). Consequently, a tribe is not barred by the Anti-Injunction Act [28 U.S.C. Section 1341], merely because the federal government would not be so barred. In delegating the federal power to access federal courts irrespective of jurisdictional bars, the statute makes no exception to preserve jurisdictional bars not incumbent on the federal government. It therefore follows, that since the federal government would not be barred by the Eleventh Amendment, neither would the tribes.

An abrogation of states' rights under the Eleventh Amendment is not a relevant concern, since the state has no right to bar the federal government who may bring suit to protect tribal interest. Since no right of the state is abrogated, a textual analysis of the statute is irrelevant.

B. 28 U.S.C. 1362 Reflects A Tension Between The Commerce Clause And The Eleventh Amendment, Which When Balanced Against Each Other, Tip In Favor Of The Tribes.

The statute in question is a Congressional enactment authorized under the Indian Commerce Clause. As noted above, this power over Indian affairs is said to be "plenary". *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977). Plenary, however, does not mean absolute, and Congressional legislation respecting Indians will be upheld "so long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward Indians." *Id.*, at 85.[58] In this case, Congress has delegated to Indian tribes the authority to access the federal courts as would the federal government. The states seek to graft over the statute a major exception severely limiting the rights of the tribes established by federal statute. The states offer no authority to support the contention that Congress intended such a result. Such a construction would be contrary to the general notions of statutory construction which hold that ambiguities in statutory language are to be resolved in favor of the Indians. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

Necessarily, the exercise of this power conflicts with the Eleventh Amendment when the tribes seek to exercise

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[58] There is no suggestion in any of the briefing so far that Congress has exceeded it's authority under the Indian Commerce Clause. As noted, the statute is intended to assist tribes in the protection of their litigable interests. Such a statute is obviously tied to Congress' unique obligation toward Indians. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

this right relative to a state. When tension is occasioned by the conflict between two provisions of the constitution, a balance must be struck to do equity to the relative Constitutional rights involved. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

As most ably argued in the amici brief of the Council of State Governments, the states surrendered a portion of their historic sovereignty upon admission to the Union. Part of that surrender involved a surrender of such immunity as necessary to permit suits by and among the states and federal government to resolve controversies in a manner consistent with the essential need for the peace of the Union. *Id.* at 11.

Similarly, upon association with the Union, Indian tribes either surrendered or involuntarily lost a portion of their historic sovereignty. *Johnson v. M'Intosh*, 21 U.S. (5 Wheat.) 543 (1823). Unlike the states, however, the tribes entered the Union upon decidedly unequal terms. Their status was less than that accorded the states. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Of particular relevance to this case was the inability to bring an original suit in the Supreme Court. As the Court in *Cherokee Nation* stated, their appeal for redress was either "to the tomahawk, or the government." *Id.*, at 16. In this day and age the suggestion that Indian tribes must resort to war to seek redress of their complaints is simply bad policy and contrary to the peace of the Union. It therefore follows that Indians should have redress of their political rights in disinterested forums for the same reasons that the state have such access.

Of course, the purpose of the Eleventh Amendment was to limit, as much as practicable, suits against the states to the Courts of those states. This purpose, however, is directly at odds with the Constitutional scheme to vest power over Indian affairs in the hands of the federal government. The practicality of this argument was noted by this Court in *United States v. Kagama*, 118 U.S. 375 (1886), wherein the Court stated:

> Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

The policy of the Eleventh Amendment, which might otherwise force tribes into hostile state forums, is clearly at odds with the Commerce Clause's reservation of Indian affairs to the province of the Federal government. Such hostility can best be illustrated in the preceding case brought by Circle in the state courts. In that case, the Court held that there was no available remedy for the tribes for a violation of state statutory law. *Circle Village Council v. State of Alaska*, No. 343 [May 13, 1987, Ak.Sup.Ct.] (Memorandum Opinion).[59]

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[59] J. Robinowitz dissented noting that relief would be available under A.S. 09.50.270.

C. Tribal Sovereign Immunity Differs From State Sovereign Immunity And Must Be Maintained.

Of course, the argument that states should not be immune from suits by Indian tribes begs the question as to tribal sovereign immunity. The policy considerations of the concepts differ to such a degree as to suggest a different treatment.

Because of its status as a sovereign entity, an Indian tribe is generally immune from suits to which it does not consent. *Chemehuevi Indian Tribe v. California Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985).[60] This immunity is coextensive with that of the United States. *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983); *California ex rel. California Department of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). As stated by the Ninth Circuit in *Chemehuevi*, this immunity is rooted in the unique relationship between the United States Government and the Indian tribes, whose sovereignty substantially predates the Constitution.[61] There are different reasons for tribal immunity from suit than there are for any immunity from suit enjoyed by the states. The tribes' immunity from suit is of the utmost necessity to preserve the autonomous

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[60] Citing, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

[61] Citing, *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981).

political structure of the tribes and to preserve tribal assets[62].

State immunity from suit is based upon "the sensitive problems inherent in making one sovereign appear against its will in the courts of another". *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279 at 294 (1973); quoted in *Welch v. Dept. of Highways & Public C*, 483 U.S. 468, 486 (1987). *Welch* also found that the extent and boundaries of state sovereign immunity from suit are determined by the structure and requirements of the federal system. The Court in *Welch* noted that the United States may sue a state, because that is inherent in the Constitutional plan[63]. States may sue other states because a federal forum for suits between states is "essential to the peace of the Union." *Welch*, supra at 483. In general, then, states may be sued by other domestic sovereigns because of the basis and boundaries of the need for states' immunity from suit.

Indian tribes, who are domestic sovereigns and who must protect the integrity of their sovereign status, including their right to self-government and their meager resources require more protection from suit, even from the states themselves if they are to survive. Few if any

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[62] Oregon, Id.; *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.) *cert. denied*, 385 U.S. 918 (1966); *Adams v. Murphy*, 165 F. 304, 308-09 (8th Cir. 1908). See Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982) demonstrating that the federal policies of tribal self-determination, economic development, and cultural autonomy require tribal immunity from suit.

[63] Citing, *Monaco v. Mississippi*, 292 U.S. 313 (1934).

states are found in such condition as to give equal concern for their very perpetuation.

Considering the unequal power of the states and the tribes, and the historical role of the federal government as an arbiter of relations between the tribes and state, the relative balance of equities suggest that the Eleventh Amendment must yield to the operation of the Commerce Clause.

CONCLUSION

Circle Village respectfully requests the Court to affirm the Circuit Court's opinion.

Respectfully submitted,

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